FEB 27 2003

No. 02-953

IN THE

Supreme Court of the United States

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM R. EVANS, Chartered, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARYLAND FIRST FINANCIAL SERVICES CORP., COURT-APPOINTED RECEIVER FOR ANSWER CARE, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent Maryland First Financial Services Corp. has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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Respondent, Maryland First Financial Services Corp., a Maryland corporation, the court-appointed receiver for Answer Care, Inc. ("the Receiver" or "Respondent"), by its undersigned counsel, files this Brief in Opposition to First Penn-Pacific Life Insurance Company's ("Petitioner" or "First Penn") Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. Factual Background

Answer Care is a Maryland corporation that was engaged in the business of promoting to third parties sales of interests in life insurance policies known as "viatical settlements." App. 3a. Answer Care would solicit investors to purchase interests in life insurance policies issued to insureds, known as "viators," who were terminally ill. App. 3a. Answer Care enlisted attorney escrow agents such as William R. Evans to ensure that investor funds were properly distributed, insurance premiums were paid, and life insurance proceeds were collected and distributed to investors upon a viator's death. App. 3a.

In September of 2000, the Maryland Securities Commissioner (the "Commissioner"), who heads the division of the Maryland agency that is responsible for enforcing the Maryland Securities Act, Title 11 of the Corporations and Associations Article of the Maryland Annotated Code (the "Act"), brought an action against Answer Care and its former President, Mark Massoni, in the Circuit Court for Baltimore City (the "receivership court"), Case No. 24-C-00-004710. App. 3a. That action involves securities fraud allegedly committed by Answer Care and its former agents and principals. App. 3a-4a.

Upon motion of the Commissioner, the receivership court placed Answer Care into receivership "to prevent the risk of further loss of investor funds, to protect the public interest and to avoid the harm that will result from a continuing violation of the Maryland Securities Act." App. 8a. The receivership court ordered the Receiver to control, manage, and account for the assets and businesses of Answer Care for the purpose of consolidating, protecting, and distributing its assets. App. 19a. In particular, the receivership court ordered the Receiver to recover assets for the benefit of Answer Care's investors through whatever steps are necessary, including the filing of claims. App. 25a.

Pursuant to the Commissioner's request, the receivership court vested the Receiver with all powers and obligations enumerated in Title 13 of the Maryland Rules. App. 8a. As noted by the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), Title 13 provides a "highly regulated state process" for state receiverships. App. 8a. Specifically, Title 13 provides that the Receiver: (1) shall mail a notice to creditors, Rule 13-202; (2) may settle claims relating to the estate with the court's approval, Rule 13-403; (3) shall file reports with the court, Rule 13-501; and (4) shall make a final distribution to creditors, Rule 13-503.

Among the policies viaticated through Answer Care is the policy at issue in this litigation, which First Penn issued in January 1998 on the life of Stanley R. Moore. App. 3a. Moore assigned the policy to Evans two months later. App. 3a. The policy has a death benefit of $2,000,000. App. 3a-4a.

II. Procedural Background

Petitioner filed this declaratory judgment action seeking to rescind the policy on the grounds that it was supposedly procured by fraud. App. 2a. Respondent intervened as the Receiver for Answer Care. App. 2a. Respondent filed a motion to dismiss arguing, *inter alia*, that *Burford* abstention was appropriate to avoid interfering with the ongoing receivership proceedings in state court. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); App. 2a. The district court agreed and dismissed the action. App. 2a. The Fourth Circuit affirmed and Petitioner's Motion for Rehearing *En Banc* was denied as untimely. Petitioner then sought review in this Court. App. 3a.

REASONS FOR DENYING THE WRIT

The sole question presented by this Petition is whether the Fourth Circuit's application of the *Burford* abstention doctrine is consistent with the purposes and scope of the doctrine. Petitioner contends that the Fourth Circuit's decision "charts a new course" by extending the *Burford* doctrine "beyond the boundaries" outlined in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). Pet. at 5-10. Specifically, Petitioner argues that *NOPSI*: (1) does not permit abstention from matters that are "judicial" and do not "involve an order or regulation issued by a state administrative agency"; and (2) limits a federal court's ability to abstain to avoid interference with state insolvency proceedings. Pet. at 8-9. Finally, Petitioner contends that, in applying an abuse of discretion standard of review, the Fourth Circuit broke from many other circuit courts that review abstention decisions *de novo*. Pet. at 9 n.4.

Petitioner's arguments have no merit. In fact, the Fourth Circuit's ruling does not conflict with this Court's abstention precedent or the many abstention decisions issued by circuit courts on facts similar to those present here. Further, there is no split in the circuits regarding the proper standard of review that applies when reviewing a decision to abstain on *Burford* grounds.

This Court should deny the Writ because the Fourth Circuit's decision is not "unprecedented," as Petitioner claims. Rather, the decision is supported by ample Supreme Court and circuit court caselaw holding abstention to be proper in order to avoid interference with ongoing state receivership proceedings. As the district court noted, "abundant authority indicat[es] that *Burford*-type abstention is *clearly* applicable in this case." App. 28a (emphasis added).

I.

THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *BURFORD* AND ITS PROGENY

The Fourth Circuit properly affirmed the district court's discretionary decision to abstain. *See* App. 7a-12a. *Burford* abstention is based on the principle that federal courts should "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford*, 319 U.S. at 318 (internal quotation marks omitted).

Under *Burford*, the federal judiciary should abstain from deciding cases: (1) that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at

bar"; *or* (2) whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361 (internal quotation marks omitted). *Burford* abstention is appropriate when a federal court decides, "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (internal citations and quotations omitted).

Applying *Burford* and its progeny, the district court conducted a careful examination of the facts and circumstances of this action, and properly exercised its discretion in ruling that this action should proceed in the receivership court, not in the federal district court. Specifically, the district court concluded that: (1) the State of Maryland has a substantial interest in the case as reflected by the Commissioner's initiation of the State receivership action to redress alleged securities fraud; (2) the receivership court has assumed comprehensive jurisdiction over Answer Care and any claims related to Answer Care; (3) this substantial state interest clearly outweighs any interest of the federal court system; and (4) the continuation of a separate federal action addressing one of many insurance policies in the receivership would likely disrupt the administration of the State receivership action, by undermining orders issued by the receivership court and by creating conflicts in the interpretation of state law. App. 23a-29a.

A. Under *NOPSI*, *Burford* Abstention Is Proper To Avoid Interfering with an Ongoing State Receivership Proceeding Initiated by the Head of a State Administrative Agency

Petitioner has a narrow view of *Burford* abstention. Purportedly relying on *NOPSI*, Petitioner argues that *Burford* abstention may only be invoked to avoid interfering with an order or regulation issued by a state administrative agency. Pet. at 8-9. Because the Commissioner did not herself issue the order establishing the receivership, but rather initiated the receivership by filing an action in state court, Petitioner suggests that *Burford* abstention does not apply and that the Fourth Circuit's decision "extends the *Burford* doctrine beyond the boundaries outlined in *NOPSI*." *Id.* This argument was properly rejected below and does not justify granting the writ, for three reasons.

First and most obvious, as noted by the Fourth Circuit, the state court receivership proceeding was initiated "by the Commissioner in her capacity as head of a state administrative agency, and it resulted in orders being issued against the company at her request." App. 11a. Thus, even if *Burford* abstention were limited to proceedings and orders of state administrative agencies, the Commissioner's action against Answer Care is precisely such a proceeding because it was brought by a state administrative agency.

Second, *Burford* abstention is not limited to administrative proceedings. While this Court in *NOPSI* discussed *Burford* abstention in the context of a state administrative proceeding and thus included language relating the *Burford* elements to "proceedings or orders of state administrative agencies," this Court's more recent

statements concerning *Burford* demonstrate that there is no state administrative proceeding requirement. In *Quackenbush v. Allstate Ins. Co.*, *supra*, this Court omitted the reference to state administrative proceedings in quoting the passage from *NOPSI* setting forth the test for *Burford* abstention. The *Quackenbush* court described the *Burford* test as follows:

> *Burford* allows a federal court to dismiss a case only if it presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or if its adjudication in a federal forum "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

517 U.S. at 726-27 (quoting *NOPSI*, 491 U.S. at 361).[1]

In fact, the relevant state proceeding in *Quackenbush* was pending in a state court rather than in an administrative agency. *Quackenbush* concerned an action in state court by the California Insurance Commissioner against Allstate seeking damages for Allstate's alleged breach of its reinsurance agreements. 517 U.S. at 709. When Allstate removed the case to federal court and sought an order compelling arbitration, the Commissioner moved to remand to state court under *Burford*. *Id.* The district court granted the motion and dismissed the complaint, but the Ninth Circuit reversed. *Id.*

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1. Significantly, the *NOPSI* court took this oft-quoted language from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976), in which there was no state administrative proceeding.

This Court affirmed the Ninth Circuit's decision rejecting *Burford* abstention, holding that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary," and that "[b]ecause this was a damages action, . . . the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Id.* at 731.

In so holding, however, this Court did not even suggest that *Burford* abstention was unavailable because the state proceedings were pending before a court rather than an administrative agency. To the contrary, the *Quackenbush* court indicated that *Burford* abstention would have been proper if the plaintiff had sought an equitable remedy rather than damages. Further, the Court added that "in the interest of avoiding inconsistent adjudications . . . , the District Court might have been justified [under *Burford*] in entering a stay to await the outcome of the state court litigation." *Id.* The present case fits squarely within the parameters for *Burford* abstention described in *Quackenbush*, because the relief sought by First Penn is equitable in nature and would affect the assets of the receivership.

Third, several post-*NOPSI* circuit court decisions have applied *Burford* abstention in the absence of a state administrative proceeding. *See, e.g., Gonzalez v. Media Elements, Inc.*, 946 F.2d 157, 157 (1st Cir. 1991) (determining to abstain in order to promote the orderly, efficient, and consistent adjudication of the liquidation of an insurer's insolvency proceedings in state court); *Feige v. Sechrest*, 90 F.3d 846, 848 (3d Cir. 1996) (noting that state court has jurisdiction over all claims arising under Pennsylvania Insurance Act of 1921); *Martin Ins. Agency, Inc. v. Prudential*

Reinsurance Co., 910 F.2d 249, 254 (5th Cir. 1990) ("A federal court should abstain from exercising jurisdiction where to do so would interfere with a specialized, unified state court system of adjudication designed to avoid inconsistent adjudication of claims arising from a comprehensive, detailed, and complex regulatory scheme in a subject area involving state law."); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 n.4 (5th Cir. 1992) (noting near unanimity among the circuit courts that *Burford* abstention is appropriate in cases related to a state's administration of an insolvent insurer); *Clark v. Fitzgibbons*, 105 F.3d 1049, 1050-51 (5th Cir. 1997) (noting that state court placed insurer in receivership and asserted exclusive jurisdiction over its property and assets); *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 427 (7th Cir. 1990) ("For a federal court to award a judgment . . . , it would have to invade the province of the state rehabilitation court. . . ."); *Wolfson v. Mut. Ben. Life Ins. Co.*, 51 F.3d 141, 144-46 (8th Cir. 1995) (abstaining from deciding claim for insurance benefits under ERISA because insurer was the subject of a pending insolvency proceeding in state court).

B. *NOPSI* Does Not Preclude *Burford* Abstention Where Adjudication in the Federal Forum Might Interfere With State Insolvency or Receivership Proceedings

In a footnote, Petitioner claims that *NOPSI* abrogated the rule favoring abstention in deference to state insolvency or rehabilitation proceedings. Pet. at 8 n.3. Petitioner is incorrect. Indeed, since this Court decided *NOPSI* in 1989, circuit courts have frequently abstained from deciding federal actions whose adjudication could interfere with state insolvency or receivership proceedings. *See, e.g.*, *Clark*, 105

F.3d at 1053 (affirming district court decision to abstain); *Barnhardt*, 961 F.2d at 532 (same); *Martin*, 910 F.2d at 255 (same); *Hartford*, 913 F.2d at 427 (same); *Feige*, 90 F.3d at 851 (same); *Wolfson*, 51 F.3d at 147 (same); *Gonzalez*, 946 F.2d at 157 (granting motion to dismiss on abstention grounds).

In support of its position, Petitioner cites three cases – *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993), *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), and *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992). These cases, however, do not support the broad proposition for which they are cited. Significantly, these cases all predate *Quackenbush*, in which this Court recognized that where, as here, the relief sought is "equitable or otherwise discretionary," federal courts have the power to dismiss cases based on abstention principles. 517 U.S. at 731. Both *University of Maryland* and *Fragoso* involved claims for damages. *See University of Maryland*, 923 F.2d at 271; *Fragoso*, 991 F.2d at 882. Moreover, these cases are otherwise distinguishable from the present case.

In *University of Maryland*, the Third Circuit examined the appropriate conditions for *Burford* abstention when deciding an action for damages against an insolvent insurance company's independent auditor. 923 F.2d at 267. The defendant auditor, Peat Marwick, and the intervenor Commissioner both filed motions to dismiss the federal action. *Id.* The district court granted the Commissioner's motion to dismiss on *Burford* abstention grounds. *Id.* The Third Circuit reversed, holding that abstention was not justified in such a case, because "Pennsylvania's regulatory scheme governing insurance company insolvencies is not concerned with protecting auditors," *id.* at 272, and thus Peat

Marwick's "connection to the state regulatory mechanism (governing insolvency proceedings) that *Burford* abstention is designed to protect [was] simply too attenuated." *Id.* at 271. The Third Circuit explained, however, that "Burford abstention may be ordered in insurer insolvency cases . . . when one of the parties to the action in which the federal court abstains is the insolvent insurer or its *receiver*, trustee, officers, and the like." *Id.* (emphasis added). The Third Circuit specifically found that abstention is appropriate when the insolvent entity's receiver is a party to the federal litigation. Thus, *University of Maryland* actually supports the district court's decision to abstain in this case since Respondent is Answer Care's receiver in the state court proceeding.

Fragoso involved a state liquidation proceeding that was initiated *after* a final judgment had been rendered in a federal court action and *after* the appeal had been assigned for hearing. *See Fragoso*, 991 F.2d at 880. Noting that "the more embryonic a case, the more significant an interference with the state framework for handling insurance liquidation if the federal tribunal does not yield," the First Circuit determined that the procedural posture of Fragoso's case made it "a very weak candidate for abstention." *Id.* at 885. The *Fragoso* court found that abstaining after entry of judgment would not serve the interests of comity and judicial efficiency. *Id.* Unlike the plaintiff in *Fragoso*, Petitioner here brought a claim for declaratory relief nearly six months *after* the Commissioner placed Answer Care into receivership. Moreover, this action was dismissed at the start of the federal lawsuit, before any discovery had taken place. Thus, unlike in *Fragoso*, notions of "comity and judicial efficiency" are served by abstention in this case.

In *Melahn*, the Sixth Circuit conducted a fact-specific *Burford* abstention analysis and concluded that the district court "abused its discretion by abstaining in this case *under the circumstances*." 965 F.2d at 1507 (emphasis added). Specifically, the *Melahn* court concluded that the receiver had elected to assert the claim outside the insolvency proceedings by filing a similar action against the same defendant in another state's court, and that adjudication of that claim in federal court would neither interfere with the receiver's control of the insolvent nor frustrate in any way the state's interests in the insolvency proceedings. *Id.* at 1506-07.

Melahn does not support Petitioner's claim that the Fourth Circuit's decision in the present case extends *Burford* beyond the boundaries described in *NOPSI*. First, the Eighth Circuit decided *Melahn* based on a fact-specific analysis and not based on a generalized conclusion that *Burford* abstention is inapplicable to state insolvency proceedings. Thus, this case does not create a split among the circuits concerning when *Burford* abstention is warranted in deference to state insolvency proceedings

Second, the facts in *Melahn* are distinguishable from the facts here. Unlike *Melahn*, here the Fourth Circuit correctly concluded that federal adjudication of First Penn's claims would likely disrupt the state receivership proceedings and lead to inconsistent rulings. App. 9a-11a. Further, the Eighth Circuit has limited *Melahn* to its facts. Three years after *Melahn*, the Eighth Circuit decided *Wolfson v. Mutual Ben. Life Ins. Co.*, in which it again considered whether abstention was warranted under *Burford* in deference to state rehabilitation proceedings. This time, the Eighth Circuit affirmed the district court's decision to abstain to "avoid[]

piecemeal litigation, conserve[] judicial resources, and further[] the cost-minimizing purposes of rehabilitation by allowing the state court to determine as well as satisfy [the] claim." *See* 51 F.3d at 146-47. In so holding, the *Wolfson* court distinguished *Melahn*. The court observed that "[t]he abstention issue often turns on the relative importance to the state court insolvency proceeding of litigating a particular claim in that proceeding." *Id.* at 145. The *Wolfson* decision further limits the precedential value of *Melahn*.

II.

THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING THE APPROPRIATE STANDARD OF REVIEW IN A CASE INVOLVING *BURFORD* ABSTENTION

Petitioner argues that there is a split among the circuits regarding the appropriate standard of review in *Burford* abstention cases. Pet. at 9. According to Petitioner, the Fourth and Eleventh Circuits are the only circuits that apply an abuse of discretion standard in reviewing a district court's decision to abstain under *Burford*. Pet. at 9 n.4. This assertion is incorrect.

The circuit courts are not split on the appropriate standard of review to apply in reviewing a *Burford* abstention decision – all circuits apply an abuse of discretion standard.[2] Indeed,

2. *See, e.g., Tribune Co. v. Abiola*, 66 F.3d 12, 13 (2d Cir. 1995) (noting that "the district court in this case did not abuse its discretion when it declined to abstain on *Burford* grounds"); *Felmeister v. Office of Attorney Ethics, Div. of New Jersey Admin.*, 856 F.2d 529, 535 (3d Cir. 1988) ("Our scope of review of a district court's decision to

(Cont'd)

Burford itself requires this result. In *Burford*, this Court described a district court's broad discretion when determining whether to abstain in a particular case:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, *in its sound discretion*, whether its jurisdiction is invoked on the grounds of diversity or citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"; for it "is in the public interest that federal courts of equity should exercise their *discretionary power* with proper regard for the rightful independence of state

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abstain under *Burford* is abuse of discretion."); *Webb. v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 701 (5th Cir. 1999) ("We review an abstention for abuse of discretion."), *cert. denied*, 528 U.S. 964 (1999); *Caudill v. Eubanks Farms, Inc.*, 301 F.3d 658, 660 (6th Cir. 2002) ("This Court reviews a district court's decision to abstain for abuse of discretion."); *International College of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998) ("We review a district court's decision whether to abstain from exercising jurisdiction for an abuse of discretion."); *Melahn*, 965 F.2d at 1507 ("We are persuaded that the district court abused its discretion by abstaining in this case under the circumstances."); *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 376 (9th Cir. 1982) ("This court will reverse a trial court ruling on abstention only if there was an abuse of discretion."); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1377 (10th Cir. 1989) ("We review under an abuse of discretion standard the district court's decision whether to apply primary jurisdiction and refer this case to the Commission."); *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000) ("[A] district court's decision to abstain will only be reversed upon a showing of abuse of discretion.") (internal quotations omitted).

> governments in carrying out their domestic policy."

319 U.S. at 318 (emphasis added) (quoting *United States v. Dern*, 289 U.S. 252, 360 (1933) and *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935)). In the decision below, the Fourth Circuit correctly applied this standard of review and found that the district court had fairly exercised its discretion. App. 12a.

Petitioner cites cases in which circuit courts have articulated a *de novo* review of whether the legal requirements for abstention exist, followed by a discretionary review of the abstention decision itself. Petitioner contends that such cases "apply *de novo* review to abstention decisions." Pet. at 9 n.4; *see, e.g.*, *Cedar Rapids Cellular Tel. v. Miller*, 280 F.3d 874, 878 (8th Cir. 2002) ("A district court's decision to abstain is reviewed for abuse of discretion, with the underlying legal decisions receiving plenary review"); *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) ("We review *de novo* whether the requirements for abstention have been met. When the requirements for abstention are present, we review the district court's decision to abstain for an abuse of discretion.").

This argument is misplaced. The standard of review described in these cases is identical to the Fourth Circuit's. Under the Fourth Circuit's articulation of the standard of review, it would certainly be an abuse of discretion for a district court to abstain in a case in which the legal requirements for abstention were absent. The present case was not such a case. In affirming the district court's decision, the Fourth Circuit correctly held that the necessary legal requirements for abstention were present and that, in abstaining, the district court reasonably exercised its discretion.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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